91-1079

NO. 91-____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

STATE OF ARIZONA,

Petitioner,

-vs-

MICHAEL DUANE MULLET,

Respondent,

ON WRIT OF CERTIORARI TO THE
ARIZONA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a criminal defendant avoid criminal prosecution altogether by claiming that an administrative penalty imposed by a state constitutional entity invokes the Fifth Amendment's prohibition of double punishment under United States v. Halper, or is it sufficient that state law requires that if the defendant is convicted of the crimes charged the trial court must take into consideration civil damages previously imposed in determining the criminal punishment?

2. Does United States v. Halper mandate that civil or administrative penalties resulting from the defendant's conduct be actual damages incurred by the investigating state agency to avoid classification as punishment under the Fifth Amendment, or may the damages be classified as remedial if they are rationally related to the harm caused by the defendant's actions?

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OPINION BELOW

Respondent, Mullet, defrauded investors of $447,177. After a hearing, the Arizona Corporation Commission found that Mullet had offered or sold unregistered securities in violation of A.R.S. §§ 44-1841 and -1842, and had violated the anti-fraud provisions of A.R.S. § 44-1991 by misrepresenting investors' profits, Mullet's compensation in the transactions, funds to be invested, and Mullet's prior felony conviction. (Appendix A at A-3-4.) An Arizona State Grand Jury subsequently indicted Mullet on one count of illegally conducting an enterprise and five counts of fraudulent schemes and artifices, all arising out of the same conduct that was the basis of the action before the Corporation Commission. (Id. at A-3.) Before the trial on the indictment, the Commission ordered Mullet to cease and desist from trading in the foreign currency futures,

to pay restitution to the investment victims in excess of $400,000, and to pay an administrative penalty of $380,000. (Id. at A-3-4.) Mullet filed a motion to dismiss the criminal prosecution on the basis that it violated his Fifth Amendment right against double punishment under this Court's opinion of United States v. Halper, 490 U.S. 435 (1989), and paid $25 of his administrative penalty. (Id. at A-4.) The trial court denied Mullet's motion to dismiss. Mullet then sought an interlocutory appeal to the Arizona Court of Appeals by way of a petition for special action. (Id. at A-4.)

The Arizona Court of Appeals reversed the trial court finding that while jeopardy did not attach to the Corporation Commission's proceedings, the imposition of the administrative penalty gave rise to inference of punishment

under Halper. (Appendix A at A-14-15.) The Court of Appeals remanded the case to the trial court for an accounting of the state's damages. (Id. at A-15-16.) The appellate court held that, if the trial court found that any portion of the administrative penalty was punishment, the trial court was to dismiss the criminal indictment. (Id. at A-15.) The state's timely petition for review was denied by the Arizona Supreme Court on September 25, 1991. (Appendix B.)

JUDGMENT SOUGHT TO BE REVIEWED

Petition for writ of certiorari to the Arizona Court of Appeals.

The Arizona Attorney General, on behalf of the State of Arizona, prays that a writ of certiorari issue to review the judgment of the Arizona Court of Appeals entered on March 19, 1991. (State's petition for review to the Arizona Supreme Court denied on September 25, 1991.)

STATEMENT OF JURISDICTION

The Arizona Court of Appeals rendered its opinion on March 19, 1991. (Appendix A.) The state's petition for review to the Arizona Supreme Court was denied on September 25, 1991. (Appendix B.) This petition for writ of certiorari is timely filed within 90 days of the Arizona Supreme Court's denial of the petition for review. Petitioner invokes this Court's jurisdiction under United States Constitution Article III, Section 2, 28 U.S.C. § 1254(a), and Supreme Court Rule 20.1.

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent part of the Fifth Amendment reads as follows:

> [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb.

The pertinent part of the Fourteenth Amendment reads as follows:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; . . .

STATEMENT OF THE CASE

Mullet is an admitted sociopath who enjoys taking big risks with other people's money. Mullet dreamed up the scheme that resulted in the instant indictment while he was in a federal prison. On April 15, 1985, Mullet was sentenced to 4 years in federal prison on two counts of making false statements on a loan application, a violation of 18 U.S.C.A. § 1014. During imprisonment, Mullet presented to his father-in-law, Robert Tennison, worksheets about his method of predicting price changes in foreign currency futures contracts. Over a period of time, Mullet impressed his father-in-law with the potential profits from this system.

Upon release from the federal prison, his father-in-law gave Mullet some money to trade using his system. Based upon Mullet's claimed profits, his

father-in-law introduced Mullet to his friends and an investment group, Rallod. Mullet told these initial investors that he would only invest a portion of their money in foreign currency futures, the rest would be in T-bills. In addition, Mullet told them that he would only receive income from the profit in the trades. Some of the investors were aware that Mullet had been in federal prison. Mullet lied, however, telling some that his convictions were for IRS violations, and telling others that the convictions were the result of his failure to keep adequate records of how bank loans were spent. Like Mullet's father-in-law, the initial group of investors only put a small amount of money into Mullet's control. That was all Mullet needed to get started.

The "system" was a great success for Mullet. From August 1987 to November 1988, Mullet reported to his investors

that everything was going fine. Two investors actually received some payments of their "profits." Besides getting verbal reports, Mullet prepared computer printouts that gave details of how each investor's share of the investment pool was growing. In reality, Mullet was steadily losing money. Nonetheless, in his last report, Mullet claimed an investment pool of close to $660,000, when in fact there was just $2,200 in the trading account.

The scheme unraveled in November 1988, when Mullet gave bad checks to an investor and to his father-in-law. At his father-in-law's insistence, Mullet faced the investors and explained that the money had been lost on some very bad trading in July. What these initial investors discovered was that Mullet had made a profit for himself. By the time of this meeting, there was only $4,219 in

the trading account, which the investors seized along with the computer they had helped buy.

Even with the demise of group one, Mullet did not stop. Instead, he created another group of people to invest in his company and use his "system." Mullet did not tell the second group that the "system" had already lost a great deal of money. Mullet likewise did not tell the second group about his prior felony record. They were told however that only a portion of their money would be invested in foreign currency futures contracts and the rest would be invested in T-bills. In addition, like the first group, Mullet told them he would only be compensated from the profits of the trades. This second group signed limited powers of attorney, which included a statement that Mullet had all necessary licenses. Needless to say, Mullet was

not licensed or registered with the Arizona Corporation Commission, the National Futures Trading Association, or the Commodities Futures Trading Commission.

During the period he traded for the second group, February 1989 to June 1989, Mullet did not conceal the losses. He could not as the investors were receiving daily reports of their investments directly from the trading house, LIT America. What Mullet did was blame his employees for the losses, claiming that the employee failed to follow the "system."

From August 1987 to June 1989, Mullet used $447,177.72 of investor funds. While Mullet lost some of the money trading in foreign currency futures, Mullet used some for his personal living expenses. After the total collapse of the business, Mullet moved to Colorado.

The Arizona Corporation Commission[1] commenced their administrative action against Mullet by issuing a Notice of Opportunity for Hearing on November 20, 1989. Mullet responded, and a hearing was held on January 24, 1990. Mullet was represented by an attorney. However, the representation was limited to counsel's statement that Mr. Mullet would not give any testimony solely out of concern for any potential future criminal liabilities. The Corporation Commission issued a final order

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1. The Arizona Corporation Commission is a commission mandated by the Arizona Constitution. Ariz. Const. art. XV, § 1. The Corporation Commission has the authority to issue certificates of incorporation and license, to inspect and investigate violations of its laws, and impose fines. Ariz. Const. art. XV, §§ 4, 5 and 19. The commission's authority to regulate securities is found in Arizona's Securities Act. A.R.S. §§ 44-1801 through -2055. If, after an administrative hearing, a person is found to have violated any provision of the chapter regulating the sale of securities, the commission may impose an administrative penalty in an amount not to exceed $5,000 per violation. A.R.S. § 44-2036.

after receiving the hearing officer's recommendations on November 29, 1990. The commission ordered restitution in the amount of approximately $400,000 for the defrauded investors and imposed civil sanctions totaling $380,000. (Appendix C, Final Order of the Arizona Corporation Commission.)

Independent of the Arizona Corporation Commission proceedings, the Arizona State Grand Jury heard evidence related to Mr. Mullet's activities on March 22, 1990. The Grand Jury issued an indictment charging Mr. Mullet with one count of Illegally Conducting an Enterprise, A.R.S. § 13-2312, and seven counts of Fraudulent Scheme and Artifice, A.R.S. § 13-2310. Based on the indictment, Mullet was arrested in Colorado.

Mullet tried to escape from his criminal responsibility by paying $25 of his administrative penalty, and filing a

motion to dismiss the criminal prosecution on the basis that the prosecution violated his Fifth Amendment right against double punishment under this Court's opinion of United States v. Halper, 490 U.S. 435 (1989). The trial court denied Mullet's motion to dismiss. Mullet then sought an interlocutory appeal to the Arizona Court of Appeals by way of a petition for special action.

The Arizona Court of Appeals reversed the trial court finding that, while jeopardy did not attach to the Corporation Commission's proceedings, the imposition of the administrative penalty gave rise to inference of punishment under Halper. (Appendix A at A-14-15.) The Court of Appeals remanded the case to the trial court for an accounting of the state's damages. (Id. at A-15.) The appellate court held that if the trial court found that any portion of the

administrative penalty was punishment, the trial court was to dismiss the criminal indictment. (Id. at A-15.) The state's timely petition for review was denied by the Arizona Supreme Court on September 25, 1991. (Appendix B.)

REASONS FOR GRANTING THE WRIT

I. An administrative penalty imposed prior to the criminal prosecution does not constitute "double punishment" under the Fifth Amendment so long as the criminal punishment imposed on conviction takes into consideration the penalty previously imposed.

In United States v. Halper, 490 U.S. 435, 109 S. Ct. 1892 (1989), this Court reiterated its holding that the double jeopardy clause of the federal constitution protects against three abuses: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. 109 S. Ct. at 1897. In Halper, the Court was

faced with the issue of whether a civil penalty, litigated and imposed after the criminal prosecution was complete, violated the double jeopardy clause's proscription of multiple punishment. 109 S. Ct. at 1897-98. This Court held that the government may not criminally prosecute a defendant, impose a criminal penalty upon him, and then bring a separate civil action based on the same conduct and receive a judgment that is not "rationally related to the goal of making the Government whole." 109 S. Ct. at 1903. In its opinion, this Court noted that it was critical to the analysis that the Government sought the civil penalty in a "subsequent proceeding." 109 S. Ct. at 1903 n.10. The reason given by the Court is that double jeopardy protects against the "possibility that the Government is seeking the second punishment because it

is dissatisfied with the sanction obtained in the first proceeding." Id.

After Halper, this Court was again asked to interpret the double jeopardy clause as it related to multiple punishments in Jones v. Thomas, ___ U.S. ___, 109 S. Ct. 2522 (1989). In Thomas, the Court noted that the double jeopardy clause does not exist to provide "unjustified windfalls" to a defendant. 109 S. Ct. at 2528. The trial court in Thomas mistakenly sentenced Thomas to consecutive sentences for felony murder and the underlying felony in violation of Missouri law. 109 S. Ct. at 2524. After Thomas had served the time for the underlying felony, he moved for post-conviction relief claiming double jeopardy barred his serving the time on the greater offense. Id. The state trial court gave Thomas credit on the

felony-murder conviction for the time served on the underlying offense, but refused to order his release. Id. This Court ultimately agreed with the trial court noting:

> [I]n the multiple punishments context, that interest [double jeopardy] is "limited to ensuring that the total punishment did not exceed that authorized by the legislature."

109 S. Ct. at 2525 (citing Halper).

In the instant case, the Arizona Court of Appeals correctly analyzed that "jeopardy" does not attach to nonjudicial proceedings by administrative bodies charged with regulating businesses. Slip op. at 6-8; see Serfass v. United States, 420 U.S. 377, 392 (1975). To that extent, the double jeopardy clause is not breached by a state's subsequent criminal prosecution as there has been no acquittal or conviction upon which jeopardy could have attached. Serfass, 420 U.S. at 392; North Carolina v.

Pearce, 395 U.S. 711 (1969); accord A.R.S. § 13-116. Where the Court of Appeals erred is in its analysis of what the double jeopardy clause requires when the state seeks to criminally prosecute on the same conduct after a "civil" sanction has been imposed.

Under Thomas and Halper, if Mullet is convicted of the crimes charged in the indictment, the sentencing court would have to consider the nature of the Corporation Commission's sanctions at sentencing to ensure that Mullet is not punished in excess of that "authorized by the legislature." Thomas, 109 S. Ct. at 2525; Halper, 109 S. Ct. at 1903. Under A.R.S. § 13-603(C) the trial court would be required to order restitution for the full economic loss suffered by the victims of Mullet's crimes. State v. Wideman, 165 Ariz. 364, 798 P.2d 1373

(Ct. App. 1990).[2] While the State of Arizona would be a "victim" under the statute,[3] the statutes provide that the state, or any other victim, could not be awarded restitution in an amount above the actual damages, and the amount of restitution must be offset by any civil damage award. A.R.S. §§ 13-807 and -105(11); State v. Iniguez, 84 Ariz. Adv. Rep. 26 (Ct. App., Apr. 11, 1991).

Under A.R.S. § 13-603, upon Mullet's conviction, the trial court would be

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2. "Economic loss" is defined as:

> [A]ny loss incurred by a person as a result of the commission of an offense. Economic loss includes lost interest, lost earning and other losses which would not have been incurred but for the offense. Economic loss does not include losses incurred by the convicted person, damages for pain and suffering, punitive damages or consequential damages.

State v. Iniguez, 84 Ariz. Adv. Rep. 26 (Ct. App., Apr. 11, 1991) (citing A.R.S. § 13-105(11), emphasis in original).

3. A.R.S. § 13-105(23).

authorized to sentence him to a term of imprisonment, a fine, or both. Under Thomas and Halper, the trial court could not punish Mullet in excess of that "authorized by the legislature." Thomas, 109 S. Ct. at 2525; Halper, 109 S. Ct. at 1903. In assessing punishment upon conviction, the trial court would have to account for the nature of the Corporation Commission sanctions to ensure that Mullet was not subject to double punishment. See, e.g., North Carolina v. Pearce, 395 U.S. at 718 (multiple punishment doctrine is only violated when "punishment already exacted for an offense is not fully 'credited' in imposing sentence upon a new conviction for the same offense"). There is nothing in the Halper opinion that suggests that the civil sanctions should act as a bar to a subsequent criminal prosecution. To the contrary, as this Court noted in

Thomas, the goal against double punishment is to ensure that the defendant is not punished in excess of that "authorized by the legislature" not to provide "unjustified windfalls." 109 S. Ct. at 2525, 2528; Halper, 109 S. Ct. at 1903. To criminally prosecute Mullet after the Corporation Commission imposed civil sanctions does not violate double jeopardy, as it does not put him twice in jeopardy or subject him to a penalty above that authorized by the legislature.

Mullet is not the only defendant on the verge of escaping criminal liability because civil penalties were imposed first. United States v. Mayers, 897 F.2d 1126 (11th Cir. 1990); State v. Magazine, 393 S.E.2d 385 (S.C. 1990); Small v. Virginia, 398 S.E. 98 (Va. Ct. App. 1990). Although this Court held that Halper was limited to the "rare case," in fact Halper-generated claims have been

asserted in a wide variety of state and federal actions across the country.[4] Given the enormous amount of parallel proceedings presently authorized by legislatures, this litigation will indubitably increase.[5] Arizona, like

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4. Mayers, (racketeering, mail and wire fraud, tax evasion); Small, (criminal contempt); Magazine, (assault and battery); Bernstein v. Sullivan, 914 F.2d 1395 (10th Cir. 1990) (professional licensing board fines); In re Cobb, 402 S.E.2d 475 (N.C. Ct. App. 1991) (same); Kvitka v. Board of Registration, 551 N.E.2d 915 (Mass. 1990) (driving license suspension following DUI conviction); United States v. Hall, 730 F. Supp. 646 (M.D. Pa. 1990) (international transportation of negotiable instruments); United States v. United States Fishing Vessel Maylin, 725 F. Supp. 1222 (S.D. Fla. 1989) (drug-related civil forfeiture); State v. Casalicchio, 569 N.E.2d 916 (Ohio 1991) (same); Ex Parte Rogers, 804 S.W.2d 945 (Tex. Ct. App. 1990) (same); United States v. Martin Schloss & Co., 724 F. Supp. 1123 (S.D.N.Y. 1989) (insider trading).

5. The following statutes, while not exhaustive, illustrate the diversity in the federal government alone of where congress has authorized parallel criminal and civil proceedings:
(continued)

other states and the United States Government,[6] has placed in certain

(footnote 5 continued)

1. Internal Revenue Code, 26 U.S.C. § 7201 (1988);
2. Civil False Claims Act, 31 U.S.C. § 3729(a) (1988); Criminal False Claims Act, 18 U.S.C. § 287 (1999);
3. Insider Trading Sanctions Act of 1984, 15 U.S.C. § 78u-1(a) (1988); 15 U.S.C. § 78ff (1988);
4. 33 U.S.C. § 1321 (b)(5) and (6)(A) (1988) (Illegal discharge of oil or hazardous substances into navigable water);
5. 42 U.S.C. § 6928 (a)(1), (d), (g) (Supp V 1987) (illegal transportation, treatment, or disposal of hazardous waste);
6. 42 U.S.C.S. § 300j-23(c), (d) (Supp. 1990) (lead in drinking water coolers);
7. Sherman Act, 15 U.S.C. §§ 1-7, 15c, 15e (1988)
8. Federal Coal Mine Health and Safety Act 30 U.S.C. § 820 (1988);
9. Environmental Pesticide Control 7 U.S.C. § 1361 (a), (b) (1988);
10. Occupational Safety and Health Act of 1970, 29 U.S.C. § 666 (a), (b), (e), (f) (1988).

6. Examples of United States dual jurisdictional authority in parallel proceedings include the Federal Trade Commission, the Securities and Exchange Commission, and the Commodity Futures Trading Commission. All three agencies

(continued)

independent administrative agencies the exclusive authority to seek administrative sanctions, while allowing other agencies the exclusive authority to criminal prosecutions. Ariz. Const. art. XV, §§ 1, 4, 19; A.R.S. § 44-2032. Given the lesser standards of proof required in administrative proceedings, these agencies are able to move quicker to remedy the wrongful conduct before the full criminal procedures can be brought to bear on a defendant. If this Court were to agree with the Arizona Court that a sanction by an administrative agency would prohibit a criminal prosecution, it would severely curtail or eliminate the effectiveness of the administrative agencies in dual prosecutions. Note:

(footnote 6 continued)

have authority to proceed civilly against violators but must refer potential criminal cases to the Attorney General. 7 U.S.C. § 13a (1989); 15 U.S.C. § 56(b) (1988); 15 U.S.C. § 78u(d) (1988).

Civil Sanctions and the Double Jeopardy Clause: Applying the Multiple Punishment Doctrine to Parallel Proceedings After United States v. Halper, 76 Va. L. Rev. 1251 (1990). Such a proposition finds no support in the Halper decision. In fact, Justice Kennedy in his special concurrence emphasized that the opinion was not to be read to "undermine the Government's efforts to enforce the laws effectively." 109 S. Ct. at 1904 (Kennedy, J., concurring). The Arizona Court of Appeals holding did just that, and the Arizona Attorney General prays this Court will accept the petition on this point and reverse the decision rendered below.

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. . . .

II. United States v. Halper does not require that administrative penalties resulting from the defendant's conduct be actual damages incurred by the investigating state agency to avoid classification as punishment under the Fifth Amendment as the damages may be classified as remedial if they are rationally related to the harm caused by the defendant's actions.

The Arizona Court of Appeals remanded the matter for the state to give an "accounting of the state's damages." (Appendix A at A-15.) Such an order is in error and disregards the plain language of Halper.

> [T]he process of affixing a sanction that compensates the Government for all its cost inevitably involves an element of rough justice. Our upholding reasonable liquidated damages clauses reflects this unavoidable imprecision. Similarly, **we have recognized that in the ordinary case fixed-penalty-plus-double-damages provisions can be said to do no more than make the Government whole**.
>
> We cast no shadow on these time-honored judgments. What we announce now is a rule for the rare case, the case such as the one before us, where a

> fixed penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the **damages he has caused**.

United States v. Halper, 109 S. Ct. at 1902 (emphasis added). Based on Halper, if a criminal defendant has been convicted and sentenced for a crime, the government may still seek civil penalties for the purpose "of making the Government whole." 109 S. Ct. at 1903. Generally, the civil sanctions may be based on a formula of a fixed penalty plus double damages. 109 S. Ct. at 1902; Rex Trailer Co. v. United States, 350 U.S. 148 (1956) (civil sanctions calculated at $2,000 for each act, plus double damages and actual costs did not amount to punishment); United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943) (defendant fined $54,000 in criminal prosecution; subsequent civil penalty based on $2,000 per count, double the amount of actual damages and costs of

the suit totalling $315,000 did not constitute punishment); Helvering v. Mitchell, 303 U.S. 391 (1938) (sanction equalling 50 percent of the $728,709.84 sought for fraudulent filing held not to be a punishment but to reimburse for investigatory and other costs of the taxpayer's fraud). Justice Kennedy specifically noted how the Halper rule would apply.

> Our rule permits the imposition in the ordinary case of at least a fixed penalty roughly proportionate to the damage caused or a reasonably liquidated amount, plus double damages.

109 S. Ct. at 1904 (Kennedy, J., concurring, emphasis added).

In the instant case, the Corporation Commission order sets forth that the penalty was based on $5,000 per violation x 36 investors x 3 violations per investor, minus $160,000 based on insufficient evidence of fraud, thereby

totalling $380,000. (Appendix C at C-15 n.1.) The commissions fixed sanction per act formula is in accordance with A.R.S. § 44-2036 and this Court's precedent of Halper, Rex Trailer, Hess, and Mitchell, and cases interpreting these cases. Karpa v. C.I.R., 909 F.2d 784, 788 (4th Cir. 1990); United State v. Naftalin, 606 F.2d 809, 812 (8th Cir. 1989); United States v. Bizzell, 921 F.2d 263, 267 (10th Cir. 1990); United States v. A Parcel of Land, 884 F.2d 41 (1st Cir. 1989); but cf. United States v. Hall, 730 F. Supp. 646 (M.D. Pa. 1990) (fine for face value of bond not rationally related to making government whole). Only when Mullet can show that the "sanction [is] overwhelmingly disproportionate to the **damages he has caused**" is he entitled to relief under the double jeopardy clause. Halper, 109 S. Ct. at 1902 (emphasis added).

In the instant case, Mullet defrauded his investors of well over $447,177.72. The Corporation Commission's sanctions of $380,000 is clearly not "overwhelmingly disproportionate to the damages he has caused." 109 S. Ct. at 1902. Without this showing, the sanctions are presumed to make the government whole. Halper. The Arizona Court of Appeals erred in remanding for an "accounting."

Likewise, the Arizona Court of Appeals' opinion indicates that the state must give a detailed account of its loss to prove that the sanctions were not punitive. Slip op. at 8-9. This is clearly contrary to this Court's holding in Halper. This Court recognized that the government's loss is more than just the cost of investigation and prosecution, but includes such intangibles as the loss of business opportunities that would have been

available to others but for the defendant's criminal action. Halper, 109 S. Ct at 1900; Rex Tailer, 73 S. Ct. at 222.

In Rex Trailer this Court upheld fines of $25,000 under the Surplus Property Act against defendants who had fraudulently purchased five trucks by claiming veteran priority rights to which they were not entitled. In discussing Rex Trailer, this Court said in Halper:

> Although the Court recognized that the Government's actual loss due to the defendants' fraud was difficult if not impossible to ascertain, it recognized that the Government did sustain injury due to the result in decrease of motor vehicles available to Government agencies, an increase in undesirable speculation, and damage to its program of providing bonafide sales to veterans.

109 S. Ct. at 1900. These tangential damages were in addition to the litigation expenses incurred by the Government. Id.

Mullet's violations have caused the State of Arizona to suffer far more damages than the mere cost of its prosecution and investigation. Mullet has diverted over $400,000 of funds for legitimate capital formation to his fraudulent scheme. Such frauds serve as a deterrent not only to the injured investors, but to other members of the general public who would be so inclined to provide venture capital for legitimate businesses. The combined overall effect of Mullet's fraud is to injure Arizona's economy and reduce its tax base. While these economic harms are real, they are not subject to precise measurement. Rex Trailer. It is not unreasonable to conclude that on its face Arizona has been harmed in an amount at least as great as that suffered by Mullet's investors. Given the investment losses of over $400,000, it is not unreasonable

to conclude that $380,000 represents a rough but reasonable approximation of the collateral harm to Arizona and that the penalty was reasonably necessary to make the government whole. Halper. This court did not require precision in determining damages in Halper, only that the damages be such as to constitute rough justice. 109 S. Ct. at 1900. The Arizona Court of Appeals and those other courts that have likewise found to the contrary are in error. Arizona prays for relief.

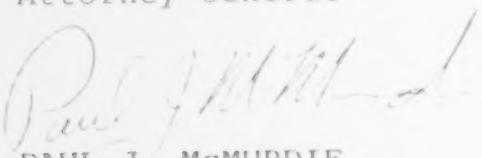
CONCLUSION

For all of the above stated reasons, the State of Arizona prays that this Court grant the petition for certiorari to the Arizona Court of Appeals and reverse its holding.

DATED this 19th day of December, 1991.

Respectfully submitted,

GRANT WOODS
Attorney General



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CERTIFICATE OF SERVICE

THREE COPIES of this Brief were deposited for mailing this 19th day of December, 1991, to:

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9537D jd

APPENDICES

APPENDIX A

[Filed March 19, 1991]

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MICHAEL DUANE MULLET, Petitioner, v. THE HONORABLE LESLIE MILLER, a Judge for THE SUPERIOR COURT OF THE STATE OF ARIZONA, COUNTY OF PIMA, Respondent, and THE STATE OF ARIZONA, Real Party in Interest.	)	2 CA-SA 91-0019 DEPARTMENT B OPINION

SPECIAL ACTION PROCEEDINGS

RELIEF GRANTED

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Grant Woods, The Attorney General
By John R. Evans
Tucson
Attorneys for Real Party in Interest

H O W A R D, Presiding Judge.

Petitioner Michael Mullet (Mullet) seeks special action relief from the order of the respondent judge denying his motion to dismiss the underlying criminal charges on double jeopardy grounds in light of a prior proceeding before and an order entered by the Arizona Corporation Commission (the Commission). Because this is a matter of statewide importance and requires consideration of legal issues as opposed to controverted questions of fact, we accept jurisdiction. University of Arizona Health Sciences Center v. Superior Court, 136 Ariz. 579, 667 P.2d 1294 (1983). For the reasons stated below, we grant relief.

The relevant facts and procedural history are as follows. On January 24, 1990, the Commission conducted a hearing regarding allegations that Mullet and Intercontinental Foreign Exchange, Ltd., Mullet's corporation, had offered or sold

unregistered securities in violation of A.R.S. §§ 44-1841 and 44-1842, and had violated the anti-fraud provisions of A.R.S. § 44-1991 by misrepresenting investors' profits, Mullet's compensation in the transactions, funds to be invested, and Mullet's prior felony conviction. Mullet was indicted by the Pima County Grand Jury on March 22, 1990, on one count of illegally conducting an enterprise from August 1987 to June 1989, and five counts of fraudulent schemes and artifices, all arising out of his use of investors' money to trade on the foreign currency futures market. On November 6, 1990, Mullet filed a motion to dismiss the criminal charges on double jeopardy grounds. The Commission issued a final order on November 29, 1990, directing Mullet to cease and desist from trading in the foreign currency futures market without complying with the proper

licensing requirements, to pay restitution in excess of $400,000 and to pay an administrative penalty of $380,000. The transcript of the Commission hearing is apparently being used by the real party in interest, the State of Arizona, in the criminal proceeding. The motion to dismiss was denied on December 17, 1990, and a subsequent motion for rehearing was denied on January 30, 1991. This special action followed.

The issue raised by this special action is whether the administrative proceeding before the Commission placed Mullet in jeopardy and whether the administrative penalty imposed by the Commission was a punishment, thus precluding the criminal prosecution based on the same conduct.[1]

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[1] We note that the state does not dispute Mullet's assertion that the criminal prosecution is based on the same conduct that was the subject of the proceeding before the Commission.

The double jeopardy clause of the Fifth Amendment to the United States Constitution "protects against a second prosecution for the same offense after acquittal . . . a second prosecution for the same offense after conviction . . . [a]nd . . . multiple punishments for the same offense." North Carolina v Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076, 23 L. Ed. 2d 656, 664-665 (1969). The meaning of the clause as it relates to successive prosecutions was further elucidated in Grady v. Corbin, 495 U.S. ___, 110 S. Ct. 2084, 2093, 109 L. Ed. 2d 548, 564 (1990), where the Supreme Court held that:

> [T]he Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted. . . .

In United States v. Halper, 490 U.S. 435, 109 S. Ct. 1892, 104 L. Ed. 2d 487

(1989), the Supreme Court addressed the double punishment aspect of the clause. Specifically, the Court considered whether a civil proceeding brought by the United States in which a fine was imposed for the submission of false claims to an insurance company subjected the defendant, who had previously been convicted of various related criminal charges, to double jeopardy by punishing the defendant twice for the same conduct. Crucial to the Court's analysis was whether the civil sanction was, in actuality, punitive in nature. The Court noted that, "[s]imply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment." 490 U.S. at ___, 109 S. Ct. at 1901-1902, 104 L. Ed. 2d at 501. The holding was narrowly drawn, the Court stating in that regard, "[w]hat we announce now is a rule for the rare case,

the case such as the one before us, where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." 490 U.S. at ___, 109 S. Ct. at 1902, 104 L. Ed. 2d at 502. The Court went on to say that "the only proscription established by our ruling is that the Government may not criminally prosecute a defendant, impose a criminal penalty upon him, and then bring a separate civil action based on the same conduct and receive a judgment that is not rationally related to the goal of making the Government whole." 490 U.S. at ___, 109 S. Ct. at 1903, 104 L. Ed. 2d at 504.

Based primarily on Grady and Halper, this court recently found that evidence of civil traffic offenses, in connection with which default judgments were entered against the defendant, could not be used against the defendant in a subsequent

criminal prosecution on aggravated assault and criminal damage charges. Taylor v. Sherrill, ___ Ariz. ___, 802 P.2d 1058 (App. 1990). We concluded that "the sanctions that flow from violating the speeding and unsafe turning laws are clearly intended to deter the offender and other drivers from committing such infractions and to promote retribution." Id. at ___, 802 P.2d at 1062. We further noted that one's license may be suspended or revoked for excessive infractions. Thus, the sanctions for the civil traffic violations were found to be punitive in nature, as they were designed to serve the goals of punishment.

Relying on Pearce, Grady, and Taylor, Mullet argues that the proceeding before the Commission placed him in jeopardy, particularly in light of the administrative penalty imposed which petitioner contends is punitive, rather than remedial, in nature.

In light of what we consider to be the unique nature of the Commission specifically, and administrative bodies generally, we do not believe jeopardy attached here under Grady, as we do not believe the proceeding may be considered a prosecution. The Commission was created by article XV, § 1 of the Arizona Constitution. The constitution grants the Commission various powers, including the power to inspect and investigate, Ariz. Const. art. XV, § 4, the power to issue certificates of incorporation and licenses, Ariz. Const. art. XV, § 5, and the power to impose fines. Ariz. Const. art. XV, § 19. It is the responsibility of the Commission to monitor, among other things, the sales of securities to ensure compliance with various statutes designed to protect the public. Our extension of the double jeopardy clause to civil traffic violations in Taylor was merely an acknowledgment that redesignating as

"civil" that which was historically criminal does not render inapplicable the constitutional protection against double jeopardy.[2] This may not be said of proceedings before the Commission. We do not believe that it was the intent of the Supreme Court in Grady to extend the protection against double jeopardy to nonjudicial proceedings by an administrative body charged with regulating business. See Serfass v. United States, 420 U.S. 377, 392, 95 S. Ct. 1055, 1064, 43 L. Ed. 2d 265, 275 (1975) ("jeopardy does not attach until a defendant is 'put to trial before the trier of the facts, whether the trier be a jury or a judge.' [Citation omitted]").

Even where the administrative proceeding has resulted in the loss of liberty, courts have recognized the

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[2] We note, as we did in Taylor, that in Grady, one of the prosecutions, unlawful lane change, was also a civil violation.

distinction between administrative and criminal proceedings, rejecting double jeopardy arguments. In United States v. Rising, 867 F.2d 1255 (10th Cir. 1989), for example, the Tenth Circuit court of appeals rejected the defendant's argument that prosecuting him for the murder of a fellow inmate was barred by double jeopardy because of a prior administrative hearing which was followed by punishment for that murder. See also Larkin v. State of Florida, 558 So. 2d 486 (Fla. App. 1990) (double jeopardy does not apply to a judicial proceeding following an administrative proceeding and, therefore, did not bar criminal prosecution for crime of attempted escape); Epps v. Board of Probation and Parole, 129 Pa. Commw. 240, 565 A.2d 214 (1989) (double jeopardy clause is inapplicable to administrative proceedings which were not, therefore, barred because of prior guilty plea for

same conduct); Alex v. State of Alaska, 484 P.2d 677 (Alaska 1971) (administrative proceeding resulting in inmate's loss of good time credits because of his escape did not bar, on double jeopardy grounds, subsequent prosecution for the crime of escape).

In Railroad Commission of Texas v. F.E.R.C., 874 F.2d 1338 (10th Cir. 1989), in a different context, the court rejected a well operator's appeal from the order of the Federal Energy Regulatory Commission which affirmed an administrative law judge's determination that the operator had violated the Natural Gas Policy Act, based on the argument that a second stage of an administrative investigation constituted double jeopardy. Pointing to the "fundamental differences" between administrative and criminal proceedings, the court, quoting a decision from the

Second Circuit court of appeals, noted as follows:

> Every person doing business and every investor knows that government agencies conduct investigations for a variety of reasons and most of them feel the duty to respond to a proper inquiry. As for those whose practices are investigated, it is a necessary hazard of doing business to be the subject of inquiry by a government regulatory agency. SEC v. Brigadoon Scotch Distrib. Co., 480 F.2d 1047, 1056 (2d Cir. 1973), cert. denied, 415 U.S. 915, 94 S. Ct. 1410, 39 L. Ed. 2d 469 (1974).

874 F.2d at 1344.

In engaging in the business of selling securities, Mullet brought himself within the purview of the Commission's regulatory and investigative powers. That the Commission investigated him, found him to have violated various state statutes and ordered him to pay restitution, as well as constitutionally and statutorily sanctioned fines, was a "hazard of doing business" that Mullet

assumed. It was not a prosecution for purposes of the double jeopardy clause.[3]

The fact that proceedings before the Commission are administrative and, therefore, not prosecutions under Grady does not end the double jeopardy inquiry. Under Halper, if the administrative penalty of $380,000 is purely punitive as opposed to remedial, the fact that it was imposed in an administrative proceeding, as opposed to a civil or criminal proceeding, does not change its nature. A cow, after all, does not become a horse simply by calling

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[3] It is irrelevant whether A.R.S. § 44-2036(C), as amended in 1990, is applicable to the Commission's order. This provision merely provides an easier method of enforcement of an order of the Commission by allowing the filing of the order with the clerk of the superior court and directing that such order be treated as a judgment of the superior court. Assuming such provision to be applicable, it does not change our conclusion that the proceeding is administrative. Nor is the proceeding one that was traditionally criminal in nature, such as we found in Taylor with regard to the civil traffic violations.

it a horse. As in Halper, we are unable to determine from the record before us, which does not contain an accounting of the state's damages, whether the administrative penalty is rationally related to making the state whole in connection with the proceedings before the Commission. As the Court in Halper stated, "[w]e must leave to the trial court the discretion to determine on the basis of such an accounting, the size of the . . . sanction the Government may receive without crossing the line between remedy and punishment." 490 U.S. at ___, 109 S. Ct. at 1902, 104 L. Ed. 2d at 502-503. We therefore remand this matter to the trial court for such a determination. In the event that the administrative penalty is determined to be a punishment, the underlying criminal proceeding must be dismissed, to the extent that the charges are based on the

same conduct that was the basis of the proceeding before the Commission. We reject the state's argument that in the event the administrative penalty is found to be punishment, to avoid double punishment in the criminal proceeding no fine may be imposed but the dismissal of the charges is not required. While multiple punishments may be imposed in a single proceeding for the same conduct if authorized by statute, the double jeopardy clause clearly prohibits a second proceeding to punish for the same conduct. See Halper, 490 U.S. at ___, 109 S. Ct. at 1903, 104 L. Ed. 2d at 503 (1989); see also Brown v. Ohio, 431 U.S. 161, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977).

We grant special action relief and remand this matter for further proceedings consistent with this opinion.

/S/
LAWRENCE HOWARD,
Presiding Judge

CONCURRING:

/S/
LLOYD FERNANDEZ,
Chief Judge

/S/
JAMES C. CARRUTH,
Judge

APPENDIX B

[Dated September 25, 1991]

Supreme Court

STATE OF ARIZONA
402 ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON
PHOENIX, ARIZONA 85007-3329

TELEPHONE: (602) 542-9396

NOEL K. DESSAINT
CLERK OF COURT

KATHLEEN E. KEMPLEY
CHIEF DEPUTY CLERK

September 25, 1991

RE: MICHAEL DUANE MULLET vs. SUP CT PIMA CO-HON. LESLIE MILLER/STATE OF ARIZONA
Supreme Court No. CV-91-0181-PR
Court of Appeals No. 2 CA-SA 91-0019
Pima County No. CR-30442

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on September 24, 1991, in regard to the above-referenced cause:

ORDERED: Petition for Review = **DENIED.**

Record returned to the Court of Appeals, Division Two, Tucson, this 26th day of September, 1991.

NOEL K. DESSAINT, Clerk

TO:

Susan A. Kettlewell, Pima County Public Defender, Great American Tower, 32 North Stone, 4th Floor, Tucson, AZ 85701

Hon. Grant Woods, Attorney General, 1275 West Washington, Phoenix, AZ 85007 ATTN: Paul J. McMurdie, Esq.

Joyce Goldsmith, Clerk, Court of Appeals, Division Two, 416 W. Congress, Tucson, AZ 85701

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APPENDIX C

[Docketed November 29, 1990]

BEFORE THE ARIZONA CORPORATION COMMISSION

MARCIA WEEKS
CHAIRMAN
RENZ D. JENNINGS
COMMISSIONER
DALE H. MORGAN
COMMISSIONER

IN THE MATTER OF THE OFFERING MICHAEL D. MULLET 1562 GREENBRIAR BLVD. BOULDER, COLORADO 80303 INTERCONTINENTAL FOREIGN EXCHANGE, LTD. 1426 PEARL BOULDER, COLORADO 80302	DOCKET NO. S-2670-I DECISION NO. 57148 OPINION AND ORDER

DATE OF HEARING: January 24, 1990

PLACE OF HEARING: Phoenix, Arizona

PRESIDING OFFICER: Marc E. Stern

APPEARANCES: Mr. Thomas E. Higgins, Jr., on behalf of Mr. Michael D. Mullet; and

Mr. Robert K. Corbin, Attorney General, by Mr. Robert A. Zumoff, Assistant Attorney General, and Mr. James D. Nielsen, Special Assistant Attorney

General, on behalf of the Securities Division of the Arizona Corporation Commission.

BY THE COMMISSION:

On November 20, 1989, the Arizona Corporation Commission ("Commission") by its Director of the Securities Division ("Division"), issued a Notice of Opportunity for Hearing Regarding a Proposed Order to Cease and Desist ("Notice") to Respondents, Mr. Michael D. Mullet and Intercontinental Foreign Exchange, Ltd. ("IFX") for alleged violations fo the Arizona Securities Act ("Act"). Effective service of the Notice was made upon Mr. Mullet and IFX. On December 6, 1989, a timely request for hearing was filed on behalf of the Respondents wherein it was requested that a hearing be set outside of the statutory time limits due to scheduling conflicts. The Division stipulated to a brief postponement.

On December 14, 1989, a Notice of Hearing was issued setting the matter for hearing on January 24, 1990. A public hearing commenced on January 24, 1990 before a duly authorized Hearing Officer of the Commission at its offices in Phoenix, Arizona. Counsel for the Respondents appeared. The Division was represented by a member of its legal staff and by an Assistant Attorney General. At the conclusion of the hearing the matter was taken under advisement by the Presiding Officer pending submission of a Recommended Opinion and Order to the Commission.

* * * * * *

Having considered the entire record herein and being fully advised in the premises, the Commission finds, concludes, and orders that:

FINDINGS OF FACT

1. Mr. Mullet, whose last known address is 1562 Greenbriar Blvd.,

Boulder, Colorado, 80303, was at all times herein the sole proprietor or president and director of IFX.

2. IFX, whose last known business address is 1426 Pearl, Boulder, Colorado, 80302, was at all times herein a business entity controlled by Mr. Mullet.

3. On November 20, 1989, the Division issued the Notice to the Respondents.

4. Effective service of the Notice was made upon Mr. Mullet and IFX.

5. A timely request for hearing was filed on behalf of Mr. Mullet and IFX.

6. Sometime during 1987 Mr. Mullet began doing business as IFX without IFX being incorporated in Arizona.

7. At that time, IFX's stated business was buying, selling and exchanging foreign currencies.

8. Mr. Mullet met with some members of a small Tucson, Arizona investment club called Rallod during August, 1987 and

discussed investments in foreign currency markets.

9. As a result of this meeting, Rallod invested $5,000 with the understanding that the monies would be invested in a foreign currency exchange through a computer program Mr. Mullet designed which purportedly would earn its investors a high rate of return.

10. In October, 1987, Mr. Gary M. Leinenbach, a member of Rallod who had not been present at the August, 1987 meeting, met Mr. Mullet at Mr. Leinenbach's place of business in Tucson, Arizona.

11. During that meeting, Mr. Mullet showed Mr. Leinenbach the purported profits generated by a computer program which supposedly predicted price fluctuations in foreign currency markets and would enable Mr. Mullet to earn profits on the fluctuations.

12. The only written material Mr. Leinenbach saw concerning Mr. Mullet's investment program was the purported computer generated profit statement.

13. Mr. Mullet informed Mr. Leinenbach that he would not receive a salary for his efforts, but would receive a percentage of any profits earned from trading in foreign currency markets.

14. Mr. Mullet told Mr. Leinenbach the computer program had generated approximately a 28 percent to 33 percent profit on his investments.

15. Subsequently, Mr. Leinenbach elected to invest with Mr. Mullet and on October 29, 1987, following Mr. Mullet's instructions, gave him a $5,000 cashier's check payable to Mr. Mullet's wife, Mrs. Jenelle Mullet.

16. Approximately one year later, on October 25, 1988, Mr. Leinenbach gave

Mr. Mullet a $5,000 check payable to IFX as an additional investment.

17. At no time did Mr. Leinenbach receive any foreign currency or indicia of title in foreign currency.

18. Mr. Leinenbach has not receive any return on his investments.

19. At no time prior to Mr. Leinenbach's investments did Mr. Mullet inform him that: he had been convicted on April 15, 1985 for making false statements on loan applications; he had been sentenced to prison for a period of two years as well as ordered to make restitution in the amount of $9,200; or neither he, IFX nor his investment program were registered with the Division.

20. In approximately July and August, 1987, Mr. Billy Jack Florence met with Mr. Mullet and discussed his computer program for analyzing foreign currency futures.

21. Mr. Mullet represented to Mr. Florence that he would invest an investor's money in foreign currency futures in such a manner that the investor could expect a minimum return of 10 percent per month on an investment of no less than $3,500.

22. Mr. Mullet told Mr. Florence that he would not receive a salary for his services, but would receive 10 percent of any profits earned using the computer program.

23. Mr. Mullet also represented to Mr. Florence that the investment activities in which he was engaging were free of government regulation.

24. During this meeting with Mr. Florence, Mr. Mullet lied to Mr. Florence concerning his earlier felony conviction.

25. Initially, Mr. Florence invested $3,500 with Mr. Mullet by giving him two

checks on or about August 3, 1987 which were payable to Mrs. Mullet.

26. Mr. Florence was subsequently informed that he was making a profit on his investment and, on or about October 26, 1987, Mr. Mullet sent a letter which stated that Mr. Florence had earned profits of $2,421 on his initial investment.

27. Based upon Mr. Mullet's fallacious representations, Mr. Florence proceeded to invest an additional $10,000 in the form of two checks made payable to Mrs. Mullet on or about November 12, 1987.

28. Mr. Florence made his largest investment on May 4, 1988 when he gave Mr. Mullet a check payable to IFX in the amount of $50,000.

29. Mr. Mullet misrepresented to Mr. Florence that his investment would be secure because 60 percent of it would be invested in a Treasury Bill and only

40 percent would be risked in trading foreign currency futures.

30. Mr. Florence was also reassured by Mr. Mullet's continuing telephone conversations about purported profits and from a computer generated profit statement which had been sent to him by Mr. Mullet.

31. Sometime during November, 1988, Mr. Mullet told Mr. Florence and other investors that he had deviated from his computer program and lost approximately $640,000 on July 15, 1988, and he also revealed that he had faked the profit statements which he had previously provided to investors.

32. In January or February, 1989, Mr. Wells Hampton, Jr., met Mr. Mullet in Phoenix, Arizona.

33. Essentially, Mr. Mullet related the story to Mr. Hampton about his computer generated foreign currency futures trading program which he had

developed in order to forecast currency futures with the prospect of earning substantial returns.

34. Mr. Mullet also told Mr. Hampton that no more than 40 percent of any invested funds would be risked in currency trading because the other 60 percent were being held in an account which was not subject to any risks.

35. On February 13, 1989, Mr. Hampton invested $10,000 with IFX.

36. Mr. Mullet failed to disclose the following facts to Mr. Hampton: his prior felony conviction; the earlier losses that he had experienced with his Tucson, Arizona investors; and that neither he nor IFX were registered with the Division, the Commodity Futures Trading Commission, or the National Futures Association.

37. Mr. Mullet also failed to present Mr. Hampton with any written documentation concerning his investments.

38. Mrs. Esther Turner, a certified public accountant employed by the Division, found that Mr. Mullet diverted at least $25,000 from investors' funds between August 4, 1987 and April 19, 1989 as either salary, monthly payments or profit taking contrary to his earlier representations to investors.

39. Mrs. Turner also found that in excess of 40 percent of investors' funds were risked in Mr. Mullet's foreign currency transactions.

40. In an analysis for August 6, 1987 to November 17, 1988, Mrs. Turner found that Mr. Mullet had actually sustained a net loss for every trading month during that time frame when he had been representing to investors that he was earning profits.

41. Mrs. Turner's analysis of Mr. Mullet's trading account also showed a number of other misrepresentations had been made to investors, including that at

the time he claimed an account equity of approximately $660,000 his actual account balance was only approximately $2,000.

42. Mrs. Turner concluded that 36 investors had invested a total of $417,177.72 in Mr. Mullet's investment schemes between August, 1987 and April, 1989.

43. The record also established that Mr. Mullet made inaccurate and false statements to the Division's Director of Enforcement concerning activities involving himself and IFX in a letter dated February 4, 1989.

44. There was no evidence that Mr. Mullet had repaid any of the monies to any of the investors who had trusted him with their funds.

45. Mr. Mullet incorporated IFX in Arizona on February 16, 1989.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Article XV

of the Arizona Constitution and the Act, A.R.S. §§ 44-1801 et seq.

2. The investment contract or commodity investment contract offered and sold by Mr. Mullet and IFX are securities within the meaning of A.R.S. § 44-1801(20).

3. The aforementioned actions of Mr. Mullet and IFX constitute an offer and/or sale of securities within the meaning of A.R.S. § 44-1801(10) and (16).

4. Mr. Mullet and IFX offered and sold unregistered securities within or from Arizona in violation of A.R.S. § 44-1841.

5. Mr. Mullet and IFX offered and sold securities within or from Arizona without being registered as salesmen or dealers in violation of A.R.S. § 44-1842.

6. Mr. Mullet and IFX offered or sold securities within or from Arizona through material misrepresentations and the omission of material facts which

constitute a fraud upon investors in violation of A.R.S. § 44-1991.

7. Mr. Mullet and IFX should be restrained from all future violations of A.R.S. §§ 44-1841, 44-1842 and 44-1991 or any other provisions of the Act.

8. Mr. Mullet and IFX should make restitution, jointly and severally, to the 36 investors in the amount of $417,177.72 pursuant to A.R.S. § 44-2032 and A.A.C. R14-4-308.

9. Mr. Mullet and IFX should be assessed, jointly and severally, an administrative penalty in the amount of $380,000 pursuant to A.R.S. § 44-2036.[1]

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[1] Although the Division recommended an administrative penalty of $540,000 ($5,000 per violation x 36 investors x 3 violations of the Act per investor = $540,000), there was no evidence with 32 of the investors what, if any, fraud took place so we have reduced the recommended penalty by $160,000 (32 x $5,000 per violation) to an amount of $380,000.

ORDER

IT IS THEREFORE ORDERED that pursuant to the authority granted to the Commission under A.R.S. § 44-2032, the Respondents, Mr. Michael D. Mullet and Intercontinental Foreign Exchange, Ltd., the agents, servants, employees, assignees, successors, and those persons in act of concert or participation with them shall cease and desist from the following and other violations of the Securities Act of Arizona:

a. Offering to sell or selling securities within or from the State of Arizona without first registering said securities by description under Article VI of the Securities Act of Arizona or registering said securities by qualification under Article VII of the Securities Act of Arizona, or qualifying for exemption thereunder;

b. Offering to sell or selling securities within or from the State of Arizona without first registering as dealers or salesmen under Article IX of the Securities Act of Arizona, or qualifying for an exemption thereunder; and

c. Directly or indirectly making any untrue statement of material facts and/or admitting to state material facts necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading in connection with the offer or sale of any security within or from Arizona, in violation of A.R.S. § 44-1991.

IT IS FURTHER ORDERED that pursuant to the authority granted to the Commission under A.R.S. § 44-2032, Respondents, Mr. Michael D. Mullet and Intercontinental

Foreign Exchange, Ltd., shall jointly and severally make restitution of all monies received from the 36 investors pursuant to A.A.C. R14-4-308 said payment to be made within 30 days after the effective date herein, subject to any legal setoffs for repayments made prior to the effective date of this Order.

IT IS FURTHER ORDERED that pursuant to the authority granted to the Commission under A.R.S. § 44-2036, Respondents, Mr. Michael D. Mullet and Intercontinental Foreign Exchange, Ltd., shall jointly and severally pay an administrative penalty in the amount of $380,000 said payment to be made within 30 days after the effective date of this Order payable to the State Treasurer for deposit into the General Fund of the State of Arizona.

IT IS FURTHER ORDERED that this Decision shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

/S/	/S/	/S/
CHAIRMAN	COMMISSIONER	COMMISSIONER

IN WITNESS WHEREOF, I, JAMES MATTHEWS, Executive Secretary of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this 28 day of November, 1990.

/S/
JAMES MATTHEWS
EXECUTIVE SECRETARY

DISSENT_____

91-1073

No. 91-_____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

STATE OF ARIZONA,

Petitioner,

vs.

MICHAEL DUANE MULLET,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

SUSAN A. KETTLEWELL
Pima County Public Defender

*DONALD S. KLEIN
Deputy Public Defender

PIMA COUNTY PUBLIC DEFENDER'S OFFICE
32 North Stone, Fourth Floor
Tucson, Arizona 85701
(602) 740-5300

ATTORNEYS FOR RESPONDENT
*Counsel of Record

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TABLE OF AUTHORITIES

No. 91-_____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

STATE OF ARIZONA,

Petitioner,

vs.

MICHAEL DUANE MULLET,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Michael Duane Mullet, respectfully requests that this Court deny the Petition for Writ of Certiorari which seeks review of the decision of the Arizona Court of Appeals entered on March 19, 1991.

OPINION BELOW

Respondent Michael Duane Mullet filed a special action in the Arizona Court of Appeals for Division Two upon the denial of his motion to dismiss a criminal indictment on double jeopardy grounds. The facts giving rise to the motion to dismiss, and as outlined by the Arizona Court of Appeals, are as follows. On

January 24, 1990, the Arizona Corporation Commission conducted a hearing concerning allegations that Respondent sold unregistered securities and engaged in various other fraudulent acts in violation of Arizona securities statutes. Respondent was subsequently criminally indicted on March 22, 1990, on the same acts which gave rise to the proceedings before the Corporation Commission. On November 6, 1990, Respondent filed a motion to dismiss the criminal charges on the basis that the double jeopardy clause of the United States and Arizona Constitutions had been violated. On November 29, 1990, the Arizona Corporation Commission issued a final order directing Respondent to cease and desist his trading activities, to pay more than $400,000.00 restitution to various investors, and to pay an administrative penalty of $380,000.00.

The trial court ruled that Respondent's double jeopardy protections against multiple prosecutions and multiple punishments had not been violated. Upon review of this decision by special action, the Arizona Court of Appeals ruled that Respondent's right to be free from multiple prosecutions had not been violated, as the proceedings before the Corporation Commission did not have the indicia of a prosecution. The Court of Appeals further determined, however, that "if the administrative penalty of $380,000.00 is purely punitive as opposed to remedial, the fact that it was imposed in an administrative proceeding, as opposed to a civil or criminal proceedings, does not change its nature. A cow after all, does

not become a horse simply by calling it a horse. As in Halper, we are unable to determine from the record before us, which does not contain an accounting of the state's damages, whether the administrative penalty is rationally related to making the state whole in connection with the proceedings before the Commission." The Court of Appeals remanded the matter to the trial court for further evidentiary proceedings concerning the characterization of the $380,000.00 administrative penalty as remedial or punitive.

The Petitioner filed a Petition for Review of the Arizona Court of Appeals' decision to the Arizona Supreme Court prior to conducting any further evidentiary hearings in the trial court as directed by the Court of Appeals. The Petition for Review was denied without comment by the Arizona Supreme Court on September 25, 1991.

STATEMENT OF THE CASE

Respondent Michael Mullet, developed a computer program which he believed could accurately predict the most opportune times to trade on the foreign currency futures market. Mullet convinced several investors of the viability and profitability of this computer program, and received various sums of money over a several month period from these investors for the purposes of trading. Needless to say, Mullet's computer program and human input were not the gold mine he and his investors had hoped it would be, and substantial sums of money were lost. According to allegations by the State, not only did Mullet lose the investors' money, he misled the investors into believing that the computer program was generating substantial profits, thus inducing the investors to invest additional funds in the program.

After receiving various complaints by investors, the Arizona Corporation Commission, represented by the Arizona Attorney General, conducted a public hearing concerning Mullet's various acts on January 24, 1990, with a final order issued on November 28, 1990. On March 22, 1990, Mullet was criminally indicted for the same acts which had been presented to the Corporation Commission. The State at all times during the pendency of the criminal proceedings has been represented by the Arizona Attorney General's Office.

Mullet's motion to dismiss the criminal proceedings was denied by the trial court. The Arizona Court of Appeals, upon review by way of a petition for special action, remanded this

matter to the trial court for further evidentiary proceedings on March 19, 1991. Review of that decision was denied by the Arizona Supreme Court on September 25, 1991. The trial court stayed further proceedings in this matter to allow the State to petition the United States Supreme Court for certiorari.

On January 8, 1992, Mullet was indicted in the United States District Court for Arizona for violations of various federal criminal statutes as the result of the same actions which were the subject of the Arizona Corporation Commission proceedings and Arizona criminal proceedings.

JURISDICTIONAL STATEMENT

The Petitioner has cited 28 U.S.C. §1254(a) as authorization for this Court's jurisdiction to review the Arizona Court of Appeals' decision rendered on March 19, 1991. 28 U.S.C. §1254(a) pertains to this Court's jurisdiction to entertain writs of certiorari arising in the various United States Courts of Appeals. This matter comes before this Court as the result of the denial of a petition for review by the Arizona Supreme Court. This Court's jurisdiction over state court decisions is grounded in 28 U.S.C. §1257, which provides that only final judgments of the State's highest court may be reviewed by a petition for certiorari.

In the instant case, a final judgment has not been rendered by Arizona's highest court. Upon a petition for special action, the Court of Appeals of Arizona remanded this matter to the trial court for a further evidentiary hearing to determine whether the $380,000.00 administrative penalty assessed against Respondent should be properly characterized as punishment or as remedial in nature. The decision of the Arizona Court of Appeals was presented by the Petitioner to the Arizona Supreme Court upon a petition for review, without benefit of first conducting the evidentiary hearing at the trial court level. This petition for review was denied by the Arizona Supreme Court without comment.

In U.S. v. Halper, 490 U.S. 435, 104 L.Ed.2d 487 (1989), 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989), this Court remanded the matter to the trial court for the exact determination which has

been left open in this case; whether the penalty assessed is remedial or punitive. Without a decision by the Arizona trial court concerning this issue, and consequently the Arizona appellate courts, review of the issue by this Court would be premature.

The general rule concerning finality of state court criminal proceedings requires that the prosecution be concluded by a judgment of conviction and imposition of sentence. Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 103 L.Ed.2d 34, 109 S.Ct. 916 (1989). The instant matter has not been concluded by conviction and sentence, and therefore this Court's jurisdiction would generally be precluded.

Exceptions have been created to the finality rule requiring conviction and sentence, however these exceptions are inapplicable here. These exceptions were delineated in the case of Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975) and are predicated on the requirement that at a minimum the federal question has been finally determined by the highest state court. Pennsylvania v. Ritchie, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40, Flynt v. Ohio, 451 U.S. 619, 101 S.Ct. 1958, 68 L.Ed.2d 489 (1981). This threshold requirement has not been met in the instant case. The Arizona Court of Appeals has made a preliminary determination that the $380,000.00 administrative penalty may constitute punishment as opposed to a remedial measure. Rather than drawing such a conclusion without benefit of a proper evidentiary basis, the Arizona Court of

Appeals remanded the matter to the trial court. The Arizona Supreme Court's denial of the petition for review is consistent with the necessity for a further evidentiary foundation. The Arizona courts may ultimately conclude that the arguments advanced by the Petitioner concerning the appropriate definition and calculation of damages are correct, thus rendering this Court's review of the Petitioner's arguments unnecessary. Under the present circumstances, Petitioner is asking this Court to render an advisory opinion in a vacuum, and jurisdiction should therefore be denied.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution Amendment V:
...Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.

United States Constitution Amendment XIV:
No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law...

REASONS FOR DENYING WRIT

A. The Imposition of a $380,000.00 Penalty by the Arizona Corporation Bars Criminal Prosecution of Respondent.

The Petitioner has cited the case of Jones v. Thomas, _____ U.S. _____, 109 S.Ct. (1989), for the proposition that Respondent would receive an "unjustified windfall" if the State is precluded from criminally prosecuting Respondent on double jeopardy grounds. The Petitioner also argues that Respondent can be punished again, under the authority of Jones v. Thomas, as long as the total punishment imposed does not exceed the total punishment authorized by the legislature in both the civil and criminal contexts. Petitioner misconstrues the holding in Jones v. Thomas, which is readily distinguishable from the instant case.

In Jones v. Thomas, supra, the defendant received two consecutive sentences subsequent to a single criminal trial. After the original sentencing it was determined that the trial court had erred, and consecutive sentences were not permitted

under the law. This Court held that the trial court properly credited the defendant for time served on the longer sentence as a result of the completion of the shorter sentence, and that the trial court was not required to totally release the defendant to avoid double jeopardy problems.

In the instant case the potential of double punishment does not arise as the result of one proceeding, but rather as the result of two distinct proceedings. It has been the Respondent's contention and the Court of Appeal's conclusion that the existing order of the Corporation Commission requiring the payment of $380,000.00 as an "administrative penalty" is a possible punishment barring criminal prosecution in a criminal trial which has yet to take place. The United States Supreme Court addressed this issue in the case of United States v. Halper, 490 U.S. 435, 109 S.Ct. 1892 (1989), as follows:

> "That the Government seeks the civil penalty in a second proceeding is critical in triggering the protections of the Double Jeopardy Clause. Since a legislature may authorize cumulative punishment under two statutes for a single course conduct, the multiple punishment inquiry in the context of a single proceedings focuses on whether the legislature actually authorized the cumulative punishment. See Ohio v. Johnson, 467 U.S. 493, 499-500 [104 S.Ct. 2536, 2540-2541, 81 L.Ed.2d 425] (1984). On the other hand, when the Government has already imposed a criminal penalty and seeks to impose additional punishment in a second proceeding, the Double Jeopardy Clause protects against the possibility that the Government is seeking the second punishment because it is dissatisfied with the sanction obtained in the first proceeding." Supra, at 109 S.Ct. 1903.

The Petitioner seeks to characterize the ruling in Halper, as applicable only when a civil proceeding follows a criminal proceeding. Although this was the fact pattern in Halper, nothing in the Halper opinion limits its validity to the Petitioner's interpretation. The crucial holding in Halper is that the government cannot "punish" an individual in more than one proceeding, whether the first proceeding is criminal, civil or administrative in nature.

The argument that a defendant should not be entitled to an "unjustifiable windfall" is also inapplicable here. Petitioner, as represented by the Attorney General's Office, chose to conduct evidentiary hearings before the Arizona Corporation Commission concerning the various alleged activities of Respondent. These same activities later became the subject of a criminal prosecution, where again Petitioner was represented by the Attorney General. Petitioner presented the same evidence to the Corporation Commission which it now seeks to use in the criminal prosecution. Respondent forewarned Petitioner of potential double jeopardy problems by filing a motion on November 6, 1990, seeking dismissal of the criminal case. Despite this knowledge, Petitioner allowed the Corporation Commission to issue an order on November 29, 1990, requiring Respondent to pay restitution, to cease and desist trading activity, and to pay a $380,000.00 "administrative penalty". Petitioner took an "unjustifiable" risk that the penalties exacted by the Corporation Commission would be characterized as punitive in nature, thus barring the

criminal prosecution on double jeopardy grounds. The obligation of the State to "play fairly" was outlined by the dissent in Jones v. Thomas as follows:

> "The Double Jeopardy Clause is and has always been, not a provision designed to assure reason and justice in the particular case, but the embodiment of technical, prophylactic rules that require the Government to turn square corners. Whenever it is applied to release a criminal deserving of punishment it frustrates justice in the particular case, but for the greater purpose of assuring repose in the totality of criminal prosecutions and sentences. There are many ways in which these technical rules might be designed. We chose one approach in Bradley - undoubtedly not the only possible approach, but also not one that can be said to be clearly wrong. (The fact that it produces a "windfall" separates it not at all from other applications of the double jeopardy guarantee.) With technical rules, above all others, it is imperative that we adhere strictly to what we have stated the rules to be. A technical rule with equitable exceptions is no rule at all. Three strikes is out. The State broke the rules here, and must abide by the result. Supra at 2533.

Respondent has not and will not realize a "windfall" in this case. Respondent will only realize the results of a course of conduct chosen by the State.

B. The Petitioner Must Establish that the Administrative Penalty of $380,000.00 is not a Punitive Sanction.

The Petitioner argues that the $380,000.00 administrative penalty is not disproportionate to the damages allegedly caused to the State by Respondent, and therefore the penalty does not constitute punishment. There is no evidence before this Court, nor was any presented to the trial court, which indicates what,

if any, actual or approximate damages were suffered by the State. The Arizona Court of Appeals recognized this lack of an evidentiary basis for determining whether or not the $380,000.00 penalty was punitive in nature, and consequently remanded this matter to the trial court for a hearing on that issue. The Petitioner's argument herein is therefore premature.

The Petitioner wants this Court to conclude without the benefit of any evidence that the method of calculating the administrative penalty used by the Corporation Commission and the resulting penalty is on its face non-punitive and is sanctioned by the existing case law. The majority of cases cited by the State for this proposition, U.S. v. Halper, 109 S.Ct. 1902, Rex Trailer Co. v. U.S., 250 U.S. 148, 76 S.Ct. 219, 100 L.Ed. 149 (1956), U.S. ex rel. Marcus v. Hess, 317 U.S. 537, 63 S.Ct. 379, 87 L.Ed. 443 (1943), Helvering v. Mitchell, 303 U.S. 391, 58 S.Ct. 630, 82 L.Ed. 917 (1938), Karpa v. C.I.R., 909 F.2d 784 (4th Cir. 1990), and U.S. v. Bizzell, 921 F.2d 263 (10th Cir. 1990), involve situations where the government was in fact a "victim" of the defendant's alleged wrongful acts, and could show some type of actual monetary loss. In the above cited cases, the formula for assessing the penalties or total damages included references to the actual damages suffered.

In the instant case the cease and desist order and order of restitution can be characterized as remedial in nature. The $380,000.00 administrative penalty, however, has no proven remedial relationship to the damages, if any, suffered by the

State. In fact, the statute involved herein, A.R.S. §44-2036, provides a formula which makes no reference to the actual damages suffered, but rather provides a $5,000.00 penalty for each violation, regardless of the amount of damages. On its face, the statute at issue appears to be a punitive action employed by the Corporation Commission in an effort to enforce the Arizona securities regulations. Without further evidence of the damages to the State of Arizona, aside from damages or loss suffered by the investors, the $380,000.00 penalty can only be construed as punishment.

CONCLUSION

The order of the Arizona Court of Appeals remanding this matter to the trial court for further proceedings renders the decision a "non-final" judgment for purposes of this Court's jurisdiction. Additionally, the Arizona Court of Appeals correctly interpreted this Court's decision in U.S. v. Halper, and properly remanded the matter for an evidentiary hearing to determine the characterization of the $380,000.00 administrative penalty as remedial or punitive. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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STATE OF ARIZONA)
) ss.
County of Pima)

DONALD S. KLEIN, a member of the bar of this Court, being duly sworn upon oath, deposes and says: that he served three (3) copies of the Response to Petition for Writ upon

Paul J. McMurdie
Assistant Attorney General
Department of Law
1275 West Washington
Phoenix, Arizona 85007

by depositing the same in the United States mail, with first class postage prepaid.

DATED this 23rd day of January, 1992.

Donald S. Klein
DONALD S. KLEIN
Attorney for Respondent

SUBSCRIBED AND SWORN to before me this 23rd day of January, 1992, by DONALD S. KLEIN.

Marian P. Cornell
Notary Public

My Commission Expires:
My Commission Expires September 6, 1994